

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

JOHNNIE BROWN,

Plaintiff,

v.

D. M. MANTEL and T. VARIZ,

Defendants.

No. C 06-1597 PJH (PR)

**ORDER GRANTING  
DEFENDANTS' MOTION TO  
DISMISS**

This is a civil rights case filed pro se by a state prisoner. Plaintiff contends that defendants, appeals coordinators who answer prisoner grievances, failed to cause his legal materials to be returned to him in time for him to use them in a pending habeas case. Defendants have now filed a motion to dismiss in which they contend that plaintiff failed to exhaust administrative remedies. Plaintiff has opposed the motion and defendants have replied. The motion is ready for ruling.

**DISCUSSION**

**I. Background**

In his complaint plaintiff alleged that his legal materials were put into storage at Salinas Valley State Prison on January 16, 2003, while he was away from the prison on a temporary transfer. At that time he had a habeas petition pending in the United States District Court for the Eastern District of California. The transfer ceased to be temporary, however, and over the next two years or so he was transferred from one prison to another without being able to retrieve his papers. He alleges that he filed several administrative appeals (grievances) which were ignored by defendants, and that even after relief was ordered at the director's level, defendants failed to provide it.

1 Plaintiff alleges that as a result of not having his papers he was unable to object to a  
2 magistrate judge's report and recommendation in his habeas case, because he was unable  
3 to determine what evidence was meant by citations to the record in the report and  
4 recommendation, and that he was unable to make a showing of an arguable violation of his  
5 constitutional rights in order to obtain a certificate of appealability. His papers were  
6 eventually found and returned to him, but it was too late.

## 7 **II. Exhaustion**

### 8 **A. Standard**

9 The Prison Litigation Reform Act of 1995 amended 42 U.S.C. § 1997e to provide  
10 that "[n]o action shall be brought with respect to prison conditions under [42 U.S.C. § 1983],  
11 or any other Federal law, by a prisoner confined in any jail, prison, or other correctional  
12 facility until such administrative remedies as are available are exhausted." 42 U.S.C. §  
13 1997e(a). Although once within the discretion of the district court, exhaustion in prisoner  
14 cases covered by § 1997e(a) is now mandatory. *Porter v Nussle*, 122 S. Ct. 983, 988  
15 (2002). All available remedies must now be exhausted; those remedies "need not meet  
16 federal standards, nor must they be 'plain, speedy, and effective.'" *Id.* (citation omitted).  
17 Even when the prisoner seeks relief not available in grievance proceedings, notably money  
18 damages, exhaustion is a prerequisite to suit. *Id.*; *Booth v Churner*, 532 U.S. 731, 741  
19 (2001). Similarly, exhaustion is a prerequisite to all inmate suits about prison life, whether  
20 they involve general circumstances or particular episodes, and whether they allege  
21 excessive force or some other wrong. *Porter*, 122 S. Ct. at 992.

22 The State of California provides its inmates and parolees the right to appeal  
23 administratively "any departmental decision, action, condition or policy perceived by those  
24 individuals as adversely affecting their welfare." Cal. Code Regs. tit. 15, § 3084.1(a). It  
25 also provides its inmates the right to file administrative appeals alleging misconduct by  
26 correctional officers. See *id.* § 3084.1(e). In order to exhaust available administrative  
27 remedies within this system, a prisoner must proceed through several levels of appeal: (1)  
28 informal resolution, (2) formal written appeal on a CDC 602 inmate appeal form, (3) second

1 level appeal to the institution head or designee, and (4) third level appeal to the Director of  
2 the California Department of Corrections. See *id.* § 3084.5; *Barry v. Ratelle*, 985 F. Supp.  
3 1235, 1237 (S.D. Cal. 1997). A final decision at the director's level satisfied the exhaustion  
4 requirement under § 1997e(a). *Id.* at 1237-38.

5 Nonexhaustion under § 1997e(a) is an affirmative defense. *Wyatt v Terhune*, 315  
6 F.3d 1108, 1119 (9th Cir 2003). It should be treated as a matter of abatement and brought  
7 in an "unenumerated Rule 12(b) motion rather than [in] a motion for summary judgment."  
8 *Id.* (citations omitted). In deciding a motion to dismiss for failure to exhaust administrative  
9 remedies under § 1997e(a), the court may look beyond the pleadings and decide disputed  
10 issues of fact. *Id.* at 1119-20. If the court concludes that the prisoner has not exhausted  
11 California's prison administrative process, the proper remedy is dismissal without prejudice.  
12 *Id.* at 1120.

### 13 B. Analysis

14 Defendants contend that plaintiff's administrative appeal which gave rise to this suit  
15 – the one in which defendants allegedly failed to take prompt-enough action to get plaintiff's  
16 legal materials back to him – was not sufficient to exhaust because plaintiff did not pursue it  
17 to the third and final level after his legal materials were returned, and that the grievance did  
18 not specifically complain about legal papers.

19 Plaintiff has no constitutional right to a grievance process or any constitutional right  
20 to an answer or to any particular answer to his grievances. *Flick v. Alba*, 932 F.2d 728 (8th  
21 Cir. 1991) (although there certainly is a right to petition government for redress of  
22 grievances (a First Amendment Right), there is no right to a response or any particular  
23 action). Hence plaintiff's only cognizable claim is that defendants hindered his access to  
24 the courts – that defendants' failure to order that his legal papers be returned to him  
25 violated his right to access to the court to litigate his habeas case. That is the claim that  
26 plaintiff had to exhaust. When this is borne in mind, it is clear that defendants are right –  
27 plaintiff did not exhaust this claim.

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1 In response to defendants' evidence that he did not exhaust through the third and  
2 final formal level any grievance involving a claim even remotely similar to the one pursued  
3 here (access to the courts), petitioner contends that his grievance carrying log number  
4 PBSP 04-00248 was sufficient to exhaust. This is the grievance that the two defendants  
5 here allegedly did not handle properly, causing him not to receive his legal papers back in  
6 time to use them in his habeas case. However, a review of the grievance, responses, and  
7 the record establishes that plaintiff did not ever say that the property he wanted to retrieve  
8 included legal papers, or that he needed it to adequately litigate a pending case. Instead,  
9 he repeatedly referred to it as "property" or "personal property." The grievance thus was  
10 not sufficient to exhaust this claim, even leaving aside the question of whether plaintiff  
11 pursued it as far as could have, because it did not present the claim advanced here – that  
12 plaintiff was without legal papers necessary for a pending case. Moreover, it does not  
13 appear from the record that plaintiff exhausted even the insufficient claim through the third  
14 and final formal level of administrative review. Accordingly, defendants have established  
15 that plaintiff did not exhaust his administrative remedies.

### 16 CONCLUSION

17 The motion to dismiss (document number 16 on the docket) is **GRANTED**. The  
18 clerk shall terminate all pending motions as moot and close the case.

19 **IT IS SO ORDERED.**

20 Dated: August 14, 2007.



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PHYLLIS J. HAMILTON  
United States District Judge